90-1087

No.

In the Supreme Court of the United States

OCTOBER TERM, 1990

KENDRIX M. EASLEY, PETITIONER,

v.

THE UNIVERSITY OF MICHIGAN BOARD OF REGENTS; TERRY SANDALOW, individually and as the Dean of Law School; THEODORE ST. ANTOINE, PETER WESTEN, BEVERLY POOLEY, each individually and as law professors; SUSAN EKLUND, individually and as Assistant Dean of Students and KRIS MUNROE, individually and as Administrative Assistant, Jointly and Severally, RESPONDENTS.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

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QUESTIONS PRESENTED

1. Whether the Sixth Circuit Court of Appeals may properly find that Judge John Feikens *does not* have an impermissible bias or prejudice resulting from his numerous extra-judicial activities, associations, affiliations, and financial ties to the University of Michigan Defendants, including but not limited to the following:

- John Feikens graduated from the University of Michigan Law School in 1941
- John Feikens' son, Jon Feikens, graduated from the University of Michigan in 1967
- John Feikens served on the Board of Governors of the University of Michigan Fund
- John Feikens is an active member of the University of Michigan Club
- John Feikens is an active member of the Committee of Visitors of the University of Michigan Law School
- John Feikens' former law firm, now know as Feikens, Foster, Vander Male & DeNardis, P.C. (of which son Jon is a partner and son Robert is a member of the firm) lists the University of Michigan as one of its biggest clients
- John Feikens' contributes money to the University of Michigan under the Joint Gift Name: Honorable and Mrs. John Feikens. The Computer Access Code for Judge John Feikens is 0001589593
- John Feikens is/was an active fundraiser for the University of Michigan
- John Feikens is an active member of the University of Michigan Alumni Association
- John Feikens is an active member and contributor to the University of Michigan Law School Fund
- John Feikens is an active participant in the University of Michigan Athletic Department.

to warrant his disqualification, pursuant to 28 USC §455?

2. Whether the Sixth Circuit Court of Appeals may properly find that Judge Feikens *did not* violate 28 USC §455 by refusing to disclose his numerous extra-judicial activities, associations, and financial ties to the University of Michigan Defendants?

3. Whether the Sixth Circuit Court of Appeals may properly find that Judge Feikens *was not* privy to extra-judicial information concerning the case, whereas the record clearly demonstrates that Judge Feikens participated in numerous ex parte meetings and communications with the University of Michigan Defendants during the pendency of this lawsuit?

4. Whether the Sixth Circuit Court of Appeals may properly find that Judge Hackett conducted an evidentiary hearing pursuant to the Order of Remand and 28 USC §455 wherein she 1) *refused* to allow any witnesses to testify; 2) *refused* to allow any of the defendants to be deposed upon oral examination or to be cross-examined during the evidentiary hearing; and 3) *refused* to compel Judge Feikens to answer any discovery, or even attend the evidentiary hearing?

[NOTE: Petitioner reserves the right to argue Question 5 in the event certiorari is granted on the above questions, but does not include Question 5 among the reasons for the grant of certiorari].

5. Whether Judge Feikens' failure to disclose his numerous extra-judicial activities, associations, and financial ties on the record or disqualify himself in previous lawsuits against the University of Michigan Defendants was an abuse of sound judicial discretion?

PARTIES TO THE PROCEEDING AND RULE 28.1 STATEMENT

All parties to the proceedings below subject to this petition are set forth in the caption. The Honorable John Feikens, United States District Court Judge for the Eastern District of Michigan, Southern Division, was a party to this proceeding during an evidentiary hearing.

Petitioner, Kendrix M. Easley has no parent company, subsidiary or affiliate to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH COURT

The Petitioner Kendrix M. Easley, respectfully prays for a writ of certiorari to review the judgment and opinions of the United States Court of Appeals for the Sixth Circuit, entered in the above-entitled proceeding on July 2, 1990.

OPINIONS BELOW

The opinions of the United States Court of Appeals for the Sixth Circuit are reported at 853 F2d 1351 (6th Cir. 1988), (App. B, infra 3a-18a) and at 906 F2d 1143 (6th Cir. 1990), (App. D, infra. 20a-29a). The Order denying the Writ of Mandamus is unreported (App. C, infra 19a).

The Opinion and Order of the United States District Court denying Plaintiff's Motion to Disqualify is unreported. (App. A, infra. 1a-2a) The other orders and opinions are reported at 619 F. Supp. 418 (1985); 627 F. Supp. 580 (1986); and 632 F. Supp 1539 (1986).

JURISDICTION

The judgment of the United States Court of Appeals for the Sixth Circuit was entered on July 2, 1990. A Petition for Rehearing and Suggestion for Rehearing En Banc was denied on September 6, 1990. (App. E, infra 30a.) The Jurisdiction of this Court to review the judgment of the Sixth Circuit is invoked under 28 USC 1254 (1).

STATUTORY PROVISIONS INVOLVED

The statutory provision involved, is 28 USC §455 *Disqualification of justice, judge or magistrate.*

STATEMENT OF THE CASE

The Plaintiff, Kendrix M. Easley, attended the University of Michigan Law School from May 1979 until May 1982.

In July 1982, Plaintiff was in Ann Arbor studying for the Michigan Bar, with little more than a week before the exam, he was accused by Defendant, Theodore St. Antoine of violating disciplinary rules.[1]

Plaintiff was ordered not to take the Bar Exam by Defendants Sue Eklund, the Assistant Dean of Students and Beverly Pooley, Chairman of the Committee on Professional Responsibility. They further stated that Plaintiff's 1982 Juris Doctor Degree would be

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[1] On June 23, 1982, Plaintiff had protested a grade he received in Defendant St. Antoine's class and the discriminatory grading procedures employed by the law school. St. Antoine angrily called Plaintiff "a damn fool" for protesting his grade and filed a cheating charge against Plaintiff.

withheld until the trial on St. Antoine's accusation was completed.

A trial was held in November 1982 wherein Plaintiff was found innocent of the accusation by a unanimous decision of the law school court.[2]

In August 1982, prior to the completion of the trial on St. Antoine's accusation, Defendant Peter Westen, upon the prompting of Sue Eklund, filed a second misconduct charge against Plaintiff.[3] (PLEASE NOTE: Plaintiff was no longer enrolled as a student at the University of Michigan nor had he *ever been enrolled as a student in Westen's class!*)

In April 1983, Plaintiff was ordered to appear for trial on Westen's accusation.

On April 11, 1983, during a pre-trial conference in the Business School, Plaintiff was asked to leave the room wherein the University of Michigan administrators and/or faculty members *stole* documents, correspondence, personal papers, evidence, etc., from Plaintiff's briefcase which would have exonerated him of Westen's misconduct charge as well as establish that Plaintiff had been awarded a 1982 Juris Doctor Degree. (PLEASE NOTE: Under the Michigan Penal Code, MCLA 750.360 — Larceny from a Public Building — the theft of documents, correspondence, personal papers, etc., is *a felony* punishable by monetary fines and/or imprisonment.)

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[2] During the trial St. Antoine confessed that:
a. His accusation of June 23, 1982 contained false statements.
b. He was mistaken in his grading of Plaintiff's exam;
c. He could detect no cheating in the exam;
d. The grading procedure employed by the law school were discriminatory.

Judge Feikens refused to allow any of the tapes, documents, or records regarding the St. Antoine accusation to be discovered, subpoenaed, or introduced into evidence during trial in United States District Court. (Please review affidavit of Douglas L. Webster, Esq.).

[3] Westen accused Plaintiff of plagiarizing a paper he had been asked to comment on in July, 1982. The paper was titled "A Comparative Analysis of African and American Slave Systems."

On April 22, 1983 a trial was held on Westen's accusation. At the trial, the law school authorities, in order to substantiate their claim that Plaintiff needed academic credit to graduate, introduced a "forged transcript" which reduced the credit in Plaintiff's civil procedure course from 6 to 5 and had written in the margin "Westen 1 or 2(?)."

In August 1983, Plaintiff received the results of the April 22, 1983 trial on Westen's accusation, for which he was found guilty, and effectively prevented from obtaining his law degree.

Approximately six months later, Sue Eklund returned the documents, correspondence, personal papers and evidence that had been *stolen* from Plaintiff's briefcase on April 11, 1983.[4]

COURSE OF PROCEEDINGS AND DISPOSITION OF CASE IN UNITED STATES DISTRICT COURT AND THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

On November 21, 1984, Plaintiff, Kendrix M. Easley filed a lawsuit against the University of Michigan and its law school administrators for violating his constitutional and civil rights.

United States District Court Judge Charles Joiner (a former law school professor and Associate Dean of the University of Michigan Law School) disqualified himself and reassigned the case to United States District Judge John Feikens. (R.2: Order of Reassignment)

On April 26, 1985, Plaintiff's attorney filed a Motion to Disqualify Judge John Feikens pursuant to 28 USC §144 and 455.

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[4] In an October 6, 1983 letter, Sue Eklund confessed that she obtained the documents from "members of the faculty committees concerned with the disciplinary hearings."

Judge Feikens refused to allow any evidence concerning the illegal search and seizure to be introduced during the trial in United States District Court.

(R.12: Motion to Disqualify). Judge Feikens denied Plaintiff's Motion and refused to disqualify himself from hearing this case.[5]

On November 26, 1985 and on March 17, 1986, the Plaintiff filed two (2) additional motions[6] demanding Judge Feikens recuse himself from this case.

Judge Feikens steadfastly refused to remove himself from this case or to disclose any of the numerous affiliations, non-judicial communications or ex parte activities between himself and the Defendants.

Judge Feikens repeatedly committed prejudicial and reversible error by 1) refusing to allow any discovery of the tapes, transcripts and other records on file at the University of Michigan Law School, which would have conclusively proven that Plaintiff 1) had obtained his 1982 Juris Doctor Degree and 2) the illegal search and seizure by the Defendants; 3) refusing to allow the deposition of the named law school defendants; 4) refusing to allow written responses to pleadings filed by the defendants; 5) refusing a jury trial; and by 6) acting as co-counsel for the defendants throughout the entire trial proceedings. (Please review the Affidavit of Douglas L. Webster, Esq.)

In April 1986, Judge John Feikens dismissed all of Plaintiff's claims against the University of Michigan.

On May 15, 1986, Plaintiff filed a Notice of Appeal to the United States Court of Appeals, and submitted his Opening Brief on December 23, 1986, and Reply Brief on March 30, 1987

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[5] In a May 22, 1985 Memorandum Opinion and Order, Judge Feikens refused to disqualify himself, writing that his association and acquaintance with the University of Michigan Defendants does not warrant disqualification, and that there is no "obligation on the part of a Judge to decline to recuse himself for a relatively trivial reason." (R.15: Memorandum Opinion, at p. 2, attached hereto as Appendix A)

[6] A Petition for Writ of Mandamus was filed with the United States Court of Appeals for the Sixth Circuit on November 26, 1985.

A Motion for a New Trial Before an Unbiased Judge was filed in United States District Court on March 17, 1986.

outlining no less than forty-four (44) reversible and prejudicial rulings by Judge John Feikens.

Beginning in August 1987 and continuing to the present date, Plaintiff began to uncover additional evidence of Judge Feikens long standing association with the University of Michigan Defendants, and his intimate involvement in the operations of the institution.

On January 5, 1988, Plaintiff filed an Emergency Motion containing evidence of Judge John Feikens' flagrant conflict of interest (violation of 28 USC § 144 and 455), with the United States Court of Appeals for the Sixth Circuit. (Sixth Circuit, R. 30: Motion regarding Judge Feikens conflict of interest).

The Emergency Motion outlined Judge Feikens' numerous affiliations and associations with the University of Michigan, including:

a. John Feikens graduated from the University of Michigan Law School in 1941

b. John Feikens' son, Jon Feikens, graduated from the University of Michigan in 1967

c. John Feikens served on the Board of Governors of the University of Michigan Fund

d. John Feikens is an active member of the University of Michigan Club

e. John Feikens is an active member of the Committee of Visitors of the University of Michigan Law School

f. John Feikens' former law firm, now known as Feikens, Foster, Vander Male & DeNardis, P.C. (of which son Jon is a partner and son Robert is a member of the firm) lists the University of Michigan as one of its biggest clients

g. John Feikens' contributes money to the University of Michigan under the Joint Gift Name: Honorable and Mrs. John Feikens. The Computer Access Code for Judge John Feikens is 0001589593.

Further, Plaintiff submitted evidence that Judge John Feikens violated the American Bar Association Code of Judicial Conduct[7] by engaging in numerous illegal "ex parte communications" and "ex parte meetings" with the Defendants.[8]

Judge John Feikens *did not* disclose any of his numerous affiliations, associations or financial ties to the University of Michigan Defendants during this lawsuit. (Please review the Affidavit of Douglas L. Webster, Esq.)

Further, Judge John Feikens failed to disclose any of his numerous affiliations and associations or financial ties to the University of Michigan Defendants in the following cases:[9]

1. *Scott E. Ewing v. Board of Regents,* 552 F. Supp 881 (1982)

2. *Scott E. Ewing v. Board of Regents,* 559 F. Supp 791 (1983)

3. *Richard Garland v. Harold T. Shapiro, et al,* 579 F. Supp 858 (1984)

4. *Wilson Crook v. Donald Peacor, et al.,* 579 F Supp 853 (1984)

5. *Christopher Jaska v. The Regents of the University of Michigan,* 597 F Supp 1245 (1984)

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[7] The ex parte communications and meetings between Judge Feikens and the Defendants were a direct violation of Judicial Canon 3(A)(4) which provides that, "A judge should accord to every person who is legally interested in a proceeding or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider ex parte or other communications concerning a pending or impending procedure.

[8] Please review June 11, 1985 extra-judicial communication from Defendant Terry Sandalow; June 19 1985 extra-judicial communication from John Feikens and Defendant Sandalow's response to Interrogatories detailing his extra-judicial meetings with John Feikens.

[9] Feikens' failure to disclose his numerous affiliations, associations and financial ties to the University of Michigan, Defendants is a direct violation of 28 USC §455.

6. *Ann Spielberg v. Board of Regents, University of Michigan,* 601 F. Supp 994 (1985)

7. *Kendrix Easley v. University of Michigan, et al,* 619 F. Supp 418 (1985)

8. *James Picozzi v. Terrance Sandalow, et al.,* 623 F Supp 1571 (1986)

9. *Kendrix Easley v. University of Michigan, et al,* 627 F. Supp 580 (1986)

10. *Kendrix Easley v. University of Michigan, et al,* 632 F. Supp 1539 (1986)

11. *Morris v. University of Michigan* — Unpublished Opinion Nos. 80-71475, 80-72041 (E. D. Mich. January 21, 1985) also 81-71475 (E.D. Mich. January 18, 1985)

COURSE OF PROCEEDINGS AND DISPOSITION OF CASE ON REMAND IN DISTRICT COURT

In August 1988, the United States Court of Appeals for the Sixth Circuit remanded *Easley v. The University of Michigan Board of Regents, et al,* to the United States District Court for an evidentiary hearing to determine (1) the nature and extent of Judge John Feikens' associations and affiliations with the University of Michigan, its faculty and its administrators; (2) whether Judge Feikens acquired extra-judicial knowledge of matters material to this controversy through these associations, particularly the Law School's Committee of Visitors; and (3) whether through these associations and affiliations Judge Feikens' impartiality might reasonably be questioned." (Sixth Circuit R. 33: Order of Remand, attached hereto as Appendix B)

On November 1, 1988, United States District Court Judge Barbara Hackett conducted a status conference on the case, wherein she stated that there would be a "full and complete discovery" of Judge Feikens' affiliations, associations and financial ties to the University of Michigan Defendants subsequent to the filing of Judge Feikens' Affidavit. (R.89: In Camera Proceeding)

On December 2, 1988, John Feikens submitted an eight (8) paragraph Affidavit which 1) *did not* list his numerous associations and affiliations with the University of Michigan; and 2) *did not* disclose the nature or extent of his activities, his contacts or the frequency of contacts with the University of Michigan, its administrators or faculty.[10]

Subsequent to the filing of Judge Feikens' Affidavit, Judge Hackett issued a Scheduling Order restricting discovery to written interrogatories and requests for production of documents. The January 13, 1989 Scheduling Order stated that *"An opportunity for examination of witness will be available to the parties during the evidentiary hearing."* (R. 98: Scheduling Order)

Judge Hackett refused to modify the Scheduling Order to allow deposition upon oral examination of the University of Michigan Defendants and/or Judge Feikens.

On February 17, 1989 Judge Hackett filed a second order stating that "[a]n evidentiary hearing is scheduled to be held on March 29, 1989 at 2:00 p.m. *At that time the parties will have an opportunity to examine witnesses under oath, if they choose to do so."* (R. 114: Order Denying Motion to Enlarge Discovery)

Neither the University of Michigan Defendants nor Judge Feikens complied with Plaintiff's discovery requests.

Judge Feikens refused to answer *any interrogatories* or produce *any documents.*

On March 3, 1989 Plaintiff filed a Motion for Order Compelling Discovery and Request for Sanctions, and simultaneously made service upon Jon Feikens by mail. (R. 125: Motion for Order Compelling Discovery)

On or about March 20, 1989 Jon Feikens filed his Opposition to Motion for Order and Request for Sanctions, saying "Judge

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[10] Feikens did admit his a) membership in the Committee of Visitors for the University of Michigan Law School; b) membership in the University of Michigan Club; and c) that he was a Fundraiser for the University of Michigan (Attached hereto as Appendix F)

Feikens *does not* intend to appear at trial or the evidentiary hearing which has been scheduled in this matter." (R. 137: Opposition to Motion for Order Compelling Discovery, at p 6)

On April 11, 1989 Plaintiff filed a Petition for Writ of Mandamus with the Sixth Circuit Court of Appeals directing Judge Feikens to answer discovery regarding his "associations and affiliations with the University of Michigan, its faculty and its administrators", to attend the evidentiary hearing and to give testimony under cross-examination.

The Sixth Circuit Court of Appeals denied the Petition for Writ of Mandamus. (Order Denying Petition for Writ of Mandamus attached hereto as Appendix C)

EVIDENTIARY HEARING

On April 17, 1989 Judge Hackett presided over an "evidentiary hearing," wherein she made conclusions and findings of fact without allowing the Plaintiff to introduce *any* evidence or documents into the record.

- Judge Hackett refused to allow any witnesses to testify.
- Judge Hackett refused to allow any of the Defendants to be cross-examined.
- Judge Hackett refused to compel Judge Feikens to answer any discovery, or even attend the "evidentiary hearing".

(R. 161: Transcript of Evidentiary Hearing, pp 10-13, 19-25)

On or about April 18, 1989 Judge Hackett filed an Order wherein she held that Judge Feikens did not "acquire actual or constructive extra-judicial knowledge of matters material to the controversy through his various associations with the University of Michigan or its law school," and that "[N]othing in this record supports a finding that the judge's impartiality might reasonably be questioned..." (R. 160: Findings and Conclusions)

SIXTH CIRCUIT COURT OF APPEALS DECISIONS

On July 2, 1990 the United States Court of Appeals for the Sixth Circuit affirmed Judge Feikens' orders and judgment and

affirmed Judge Hackett's conclusions and findings of fact. (Sixth Circuit, R. 49: Order and Opinion, attached hereto as Appendix D)

On July 16, 1990 Plaintiff filed a Petition for Rehearing and Suggestion for Rehearing En Banc. (Sixth Circuit, R. 51: Petition for Rehearing)

On September 6, 1990 the United States Court of Appeals for the Sixth Circuit denied Plaintiff's Petition for Rehearing and Suggestion for Rehearing En Banc. (Order denying Petition for Rehearing, attached hereto as Appendix E)

REASONS FOR GRANTING THE PETITION

I.

THE SIXTH CIRCUIT COURT OF APPEALS DECISION CONFLICTS WITH THE UNITED STATES SUPREME COURT, AND ALL OTHER CIRCUITS COURTS' INTERPRETATION AND APPLICATION OF 28 USC §455.

The Sixth Circuit Court of Appeals' decision in *Easley v. The University of Michigan Board of Regents, et al.* deviates significantly from decisions of the United States Supreme Court, previous opinions of the United States Court of Appeals for the Sixth Circuit and raises a conflict with other current authority. Further, the opinions do not apply the facts of the case or the federal law.

The purpose of 28 USC §455 governing disqualification of distri t court judges is to ensure not only actual impartiality, but also the appearance of impartiality.

In 1974 Congress amended the Judicial Code to broaden and clarify the grounds for judicial disqualification and to conform with the recently adopted ABA Code of Judicial Conduct, Canon 3C.

The legislative history of the 1974 amendment to §455 explains that the previous subjective standard was replaced with

an objective standard for determining judicial disqualification. No longer was disqualification to be decided on the basis of the opinion of the judge in question, but by the standard of what a reasonable person would think.

By allowing Judge Feikens to decide whether or not to disclose his numerous extra-judicial activities, associations, affiliations, and financial ties to the University of Michigan Defendants, and by affirming Judge Feikens decision not to disqualify himself from this particular proceeding, the Sixth Circuit Court of Appeals has effectively repealed and nullified the legislative enactment, and replaced the objective test for disqualification with a subjective standard.

A. Judge Feikens Has An Impermissible Bias Or Prejudice Resulting From His Numerous Extra-Judicial Activities, Associations, Affiliations and Financial Ties To Warrant His Disqualification

The provisions of 28 USC §455 state in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> > (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

Judge Feikens has an impermissible bias or prejudice resulting from his numerous extra-judicial activities, associations, affiliations and financial ties to the University of Michigan, Defendants to warrant his disqualification, including but not limited to the following:

- John Feikens graduated from the University of Michigan Law School in 1941
- John Feikens' son, Jon Feikens, graduated from the University of Michigan in 1967

- John Feikens served on the Board of Governors of the University of Michigan Fund
- John Feikens is an active member of the University of Michigan Club
- John Feikens is an active member of the Committee of Visitors of the University of Michigan Law School
- John Feikens' former law firm, now know as Feikens, Foster, Vander Male & DeNardis, P.C. (of which son Jon is a partner and son Robert is a member of the firm) lists the University of Michigan as one of its biggest clients
- John Feikens' contributes money to the University of Michigan under the Joint Gift Name: Honorable and Mrs. John Feikens. The Computer Access Code for Judge John Feikens is 0001589593
- John Feikens is/was an active fundraiser for the University of Michigan
- John Feikens is an active member of the University of Michigan Alumni Association, (See Attached Appendix G)
- John Feikens is an active member and contributor to the University of Michigan Law School Fund (See Attached Appendix H)
- John Feikens is an active participant in the University of Michigan Athletic Department.

The test for impartiality under 28 USC §455 is whether or not a reasonable person with knowledge of all the facts would conclude that Judge Feikens' impartiality might reasonably be questioned. *In re MGM Grand Hotel Fire Litigation*, 570 F Supp 913 (D Nev, 1983); *United States v. Nobel*, 696 F2d 231 (3rd Cir. 1982) *United States v. Amerine*, 411 F2d 1130 (6th Cir. 1969).

Under 28 USC Section 455, the Court must consider how his or her participation in a case would appear to "the average person on the street." *Portashnick v. Port City Construction Co.*,

609 F2d 1101, 1111 (5th Cir. 1980). The objective standard to be applied has been formulated by different courts as: when a reasonable person would have factual grounds, based on objective appearances to doubt the impartiality of the judge, *Home Placement Services, Inc., v. Providence Journal Co.*, 739 F2d 671 (1st Cir. 1984); when a reasonable person would conclude that the Judge's impartiality might reasonably be questioned, *United States v. Story*, 716 F2d 1088 (6th Cir. 1983); or when there is a reasonable inference of a lack of impartiality on the part of the judge. *Idaho v. Freeman*, 507 F. Supp 706 (1980). The use of the word "might" in 28 USC Section 455 emphasizes the broad application of this section to situations where the appearance of impartiality might threaten the perceived integrity of the judicial system. The purpose and language of 28 USC Section 455 requires a judge to "err on the side of caution" and disqualify himself. *Portashnick v. Port City Construction Co., supra*, 609 F2d at 1112.

In addition to the above mentioned undisclosed affiliations, associations and financial ties to the University of Michigan, Defendants, Judge Feikens was engaged in ex parte communications and participated in ex parte meetings with Defendant Terry Sandalow, including but not limited to the following:

- Defendant Terry Sandalow was a dinner guest in Judge Feikens' home during the pendency of this lawsuit. (R. 110: Response to Plaintiff's First Set of Interrogatories to Defendant Terry Sandalow, p. 6).

- Both Judge Feikens and Terry Sandalow engaged in extra-judicial communication regarding the University of Michigan Law School Committee of Visitors during the pendency of this lawsuit.

Judge Feikens' numerous extra-judicial activities and ex parte meetings and communications with the University of Michigan Defendants are clearly such as to convince a reasonable person that an impermissible bias exists which requires his disqualification.

B. Judge Feikens Failed to Disqualify Himself *Ex Mero Motu* Nor Would He Disclose His Numerous Affiliations, Associations And Financial Ties To The University Of Michigan Defendants.

The provisions of 28 USC §455(e) states in relevant part:

> Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is *preceded* by a *full disclosure on the record* of the basis for disqualification. (Emphasis added)

Judge Feikens *did not* disclose any of his numerous affiliations, associations or financial ties to the University of Michigan Defendants during the pendency of this lawsuit, nor did he disclose his long standing association and intimate involvement with the institution during other litigants cases against the University of Michigan.

The plain language and case law require that 28 USC 455 (e) be strictly construed. *United States v. Murphy*, 768 F2d 1518 (7th Cir. 1985), cert. denied, 475 U.S. 1012, 106 S. Ct. 1188, 89 L. Ed 2d 304 (1986); *Portashnick v. Port City Construction Company*, 609 F. 2d 1101, (5th Cir. 1980), cert. denied 449 US 820, 101 S. Ct. 78, 66 L. Ed 2d 22 (1980).

Although Plaintiff filed three (3) separate pleadings to recuse Judge Feikens. Judge Feikens repeatedly failed to disqualify himself from the case and refused to disclose his numerous affiliations, associations and financial ties to the University of Michigan Defendants. Judge Feikens clearly violated the federal law.

C. The Trial Court Refused To Allow A Full Disclosure On The Record Of Judge Feikens Affiliations, Associations and Financial Ties To the University of Michigan Defendants, In Violation of 28 USC 455(e).

In August 1988, the United States Court of Appeals for the Sixth Circuit remanded *Easley v. The University of Michigan Board of Regents, et al,* to the United States District Court for an

evidentiary hearing to determine (1) the nature and extent of Judge John Feikens' associations and affiliations with the University of Michigan, its faculty and its administrators; (2) whether Judge Feikens acquired extra-judicial knowledge of matters material to this controversy through these associations, particularly the Law School's Committee of Visitors; and (3) whether through these associations and affiliations Judge Feikens' impartiality might reasonably be questioned." (Order of Remand attached hereto as Appendix B)

In response to the remand and order Judge Feikens filed an Affidavit on December 2, 1988 admitting for the first time his 1) membership in the Committee of Visitors for the University of Michigan Law School; 2) membership in the University of Michigan Club; and 3) that he was a Fundraiser for the University of Michigan (Appendix F).

Judge Feikens *did not* disclose any information concerning his involvement with the University of Michigan Alumni Association (Appendix G); contributions to the University of Michigan Law School Fund (Appendix H); ex parte meetings with Defendant Sandalow; or his involvement with the University of Michigan Athletic Department.

Further Judge Feikens refused to answer *any* discovery and stated that he would *not* "appear at trial or the evidentiary hearing which has been scheduled in this matter." (R. 137: Opposition to Motion for Order Compelling Discovery, at p. 6)

Neither Judge Hackett nor the Sixth Circuit Court of Appeals would compel Judge Feikens to answer *any* discovery, or even attend the evidentiary hearing. (Appendix C)

In the instant case, Plaintiff was not given the opportunity to develop a "full .. record of the basis for disqualification" in accordance with 28 USC §455(e).

The Sixth Circuit Court of Appeals has interpreted 28 USC §455 in a manner that is in direct conflict with other court of appeals and with prior rulings of the United States Supreme Court.

The Sixth Circuit Court of Appeals decision cannot be reconciled with the plain language of the statute, its stated purpose, or legislative history addressing these precise points.

CONCLUSION

For these various reasons, this petition for certiorari should be granted. Petitioner reiterates that Question 5 is presented herein, not as a reason for granting certiorari, but because in the posture of this case this is the only opportunity for the United States Supreme Court to consider, "the . . . injustice to the parties in (past cases), the risk that the denial of relief will produce in other cases, and the risk of undermining the public confidence in the judicial process," in future cases. (See *Liljeberg v. Health Services Acquisition Corporation*, ___US___, 108 S. Ct 2194, 100 L. Ed 2d 855, (1988).

If the petitioner is correct in urging that Judge Feikens should have sua sponte disclosed his numerous extra-judicial activities, affiliations, associations and financial ties to the University of Michigan Defendants and recused himself from this case, an Order should be entered by the U.S. Supreme Court on behalf of petitioner summarily disposing of this case on the merits.

Respectfully Submitted,

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Dated: November 30, 1990

Isaiah 41:10-12
St. Luke 18: 7, 8

APPENDICES

APPENDICES

Attached hereto and incorporated herein by references are Appendices A through H, described in more detail as follows:

Appendix A — May 22, 1985, Memorandum Opinion and Order of Judge Feikens refusing to disqualify himself or disclose his affiliations, associations or financial ties to the University of Michigan, Defendants.

Appendix B — August 11, 1988 Opinion and Order of the Sixth Circuit Court of Appeals remanding case to district court for an evidentiary hearing.

Appendix C — Denial of Writ of Mandamus directing Judge Feikens to respond to discovery, to attend the evidentiary hearing and to give testimony under cross-examination.

Appendix D — July 2, 1990 Opinion and Order of the Sixth Circuit Court of Appeals affirming Judge Feikens' orders and judgment and affirming Judge Hackett's conclusions and findings of fact.

Appendix E — September 6, 1990 Order Denying Petition for Rehearing and Suggestion for Rehearing En Banc

Appendix F — December 1, 1988 Affidavit of Judge Feikens.

Appendix G — Judge Feikens' *undisclosed* involvement with the University of Michigan Alumni Association.

Appendix H — Judge Feikens' *undisclosed* contributions to the University of Michigan Law School Fund.

Appendix A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENDRIX M. EASLEY,
Plaintiff,

v.

UNIVERSITY OF MICHIGAN BOARD OF REGENTS; TERRY SANDALOW, DEAN OF LAW SCHOOL; THEODORE ST. ANTOINE; PETER WESTEN; BEVERLY POOLEY; SUSAN EKLUND AND KRIS MUNROE, Jointly and Severally,
Defendants.

No. 84-CV-7560-AA
Hon. John Feikens

MEMORANDUM OPINION AND ORDER

I have considered plaintiff's motion for disqualification under 28 U.S.C. §§ 144, 455 (1982), and conclude that it is without merit. Assuming plaintiffs' allegations to be true, *see United States* v. *Story*, 716 F.2d 1088, 1090 (6th Cir. 1983), plaintiff has alleged no facts that indicate a personal bias or any other reason to question my impartiality in this case.

Plaintiff's principal argument is that my remarks in a *Detroit Free Press* interview reveal prejudice against a class (blacks) that plaintiff is a member of. I reject that contention for the reasons explained in *Morris* v. *University of Michigan*, Nos. 80-71475, 80-72041, mem. op. at 2 (E.D. Mich. Jan. 21, 1985):

> Taken in context, those remarks simply articulated one of the underlying rationales for affirmative action: the legacy of discrimination means that the successful achievement of a fully-integrated society will take time. Such a view does not reflect bias toward blacks as a class and certainly does not evidence a personal bias toward plaintiff that might prevent me from impartially judging [his] case.

Alternatively, plaintiff suggested at oral argument that because I graduated from the University of Michigan Law School and am acquainted with some of the professors and administrators at the school, disqualification is warranted. Plaintiff cites no case law supporting this claim. I do not think that my impartiality might reasonably be questioned because of such associations. *See generally In re Martin-Trigona*, 573 F. Supp. 1237, 1243 (D. Conn. 1983) ("[A]ny tenuous connection of a judge to a lawyer who has represented or dealt with a litigant in a case before that judge does not automatically disqualify the judge. There is an obligation on the part of a judge to decline to recuse himself for a 'relatively trivial reason.'") (citation omitted). Indeed, were associations of this sort sufficient to require disqualification, it is likely that few, if any, judges on this Court could adjudicate a dispute involving the University of Michigan. Neither the language nor spirit of 28 U.S.C. §§ 144, 455, dictates such a result.

Accordingly, plaintiff's motion for disqualification is hereby DENIED.

IT IS SO ORDERED.

(s) JOHN FEIKENS
Chief United States District Judge

Dated: May 22, 1985

Appendix B

No. 86-1483

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENDRIX M. EASLEY,
Plaintiff-Appellant,

v.

UNIVERSITY OF MICHIGAN BOARD OF REGENTS; TERRY SANDALOW, individually and as Dean of Law School; ET AL.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed August 11, 1988

Before: MERRITT and RYAN, Circuit Judges; and PECK, Senior Circuit Judge.

RYAN, Circuit Judge. Plaintiff-appellant Kendrix M. Easley appeals from several adverse rulings by United States District Court Judge John Feikens in this action brought under 42 U.S.C. §§ 1981, 1982, and 1983 against various officials of the University of Michigan Law School. Although the appellant has raised a host of assignments of error, the only issue having arguable merit is whether Judge Feikens abused his discretion in denying Easley's motion to disqualify the Judge under 28 U.S.C. §§ 144 and 455 based upon Judge

Feikens' affiliations with the Law School during times material to Easley's lawsuit.

Easley properly raised the issue of Judge Feikens' impartiality during proceedings before the district court. Easley sought Judge Feikens' recusal based upon his associations with the Law School and its faculty and "his well-publicized Negrophobia." In addition, Easley filed an "Emergency Motion" before this court alleging that Judge Feikens has additional affiliations with the University of Michigan which Easley previously failed to assert. We find some of these asserted grounds for disqualification to be patently meritless. Others require explication.

Accordingly, in order to afford Judge Feikens an opportunity to address any potentially troublesome affiliations raised by Easley below and on appeal, and, if such affiliations are established, to determine whether, as a consequence thereof, Judge Feikens' impartiality in this case might reasonably be questioned, 28 U.S.C. § 455(a) and (b)(1), we retain jurisdiction and remand the case for an evidentiary hearing. The limited purposes of the hearing will be: (1) to enlarge the record regarding the nature of Judge Feikens' associations with the Law School, its faculty, and its administrators; (2) to determine whether Judge Feikens acquired actual or constructive extra-judicial knowledge of matters material to this controversy through such associations; and (3) to determine whether any associations Judge Feikens may have had with the Law School are such that the Judge's "impartiality might reasonably be questioned."

I.

Easley, a former student at the University of Michigan Law School, brought suit against several University officials seeking equitable and legal relief. Easley, who was enrolled at the Law School from 1979 until he was suspended for plagiarism in August of 1983, claimed that Law School officials wrong-

fully deprived him of a J.D. degree. Easley sought damages and an injunction ordering the University to award him a J.D. degree.

The spiral of events culminating in this action began during the 1979 fall academic term during which Easley was enrolled in Professor Martin's introductory civil procedure course. Professor Martin's one semester section was worth five credit hours. The University also offered civil procedure sections worth six credit hours, but the six credit sections met for two consecutive semesters, each worth three credit hours. Easley did not take the final examination in Professor Martin's class as scheduled in December of 1979. He received permission from Associate Dean Eklund to take the examination in January 1980, but again delayed taking the test.

In 1981, toward the end of the fall term, Easley was informed by Dean Eklund and Kris Munroe, the Law School's recorder, that his civil procedure course work was incomplete. The examination was again rescheduled and again postponed at Easley's request. Easley eventually took the examination in March of 1982 and received a passing score. He now claims that shortly thereafter, in April of 1982, Munroe notified him of his passing score, and that both Munroe and Dean Eklund told him that he had earned six credit hours.

In accordance with standard Law School procedure, Munroe did not enter Easley's grade into the Law School's computer, which generates student transcripts, until June 22, the end of the semester. Munroe's entries, however, erroneously indicated that Easley had enrolled in a six credit civil procedure section rather than Professor Martin's five credit section. While conducting a routine degree audit, Dean Eklund and Munroe discovered the error and corrected Easley's record to reflect the fact that he had earned only five civil procedure credits. On July 16, 1982, Eklund informed Easley that he had erroneously been awarded an extra credit hour

and that he had actually earned only 80 credits, one credit shy of the number required for graduates entering in Easley's class. Although Dean Eklund had limited discretion to determine the number of credit hours a student could receive for an independent study course, she had no authority to alter the number of credit hours given for established courses like civil procedure.

On June 18, 1982, prior to receiving Dean Eklund's notice, Easley approached Professor St. Antoine in an effort to improve his final exam grade of "D" in Professor St. Antoine's course in employment discrimination. Professor St. Antoine reread Easley's examination and raised the grade to a "D+." Easley again asked Professor St. Antoine to raise his grade and, after a heated exchange, Professor St. Antoine asked Easley to leave his office. While returning Easley's exam to the file, Professor St. Antoine observed markings on the examination blue book cover that led him to conclude that "[p]lainly there had been a substitution of blue books." Thereafter, on July 15, 1982, St. Antoine charged Easley with cheating. On November 23, 1982, Easley was found innocent of the charges in proceedings before a Law School tribunal chaired by the late Professor Wade McCree, a former judge on this court.

Before his November hearing on the cheating charge, Easley purportedly presented a paper to Professor Westen as a pretext in order to talk with a faculty member about the cheating accusation. Professor Westen thought he recognized much of the paper's text from an uncited law review article. Professor Westen thereafter charged Easley with plagiarism. Easley was found guilty in August of 1983 after an April 22, 1983, trial before another Law School tribunal, also chaired by Professor McCree. Easley was thereafter suspended for one year from completing the work necessary to earn the one credit needed for his degree.

Easley now claims that University officials asked him to leave an April 11, 1983 hearing at the Law School on the

plagiarism charge. In addition, according to Easley, these officials removed exculpatory personal papers and documents from his briefcase in his absence. The only named defendant who was present at the conference is Professor Pooley, Chairman of the Law School's Committee on Professional Responsibility. Easley, however, has not accused Professor Pooley of conducting the alleged search and has been unwilling to state which, if any, documents were taken from his briefcase.

Rather than wait out his one-year suspension, Easley filed this action on November 21, 1984, asserting the following eight claims against the University and various Law School officials:

Count I:	The University of Michigan lacks jurisdiction and authority to rescind a degree.
Count II:	A violation of procedural due process and rights secured by the fourth amendment.
Count III:	A violation of substantive due process.
Count IV:	Race discrimination.
Count V:	A violation of the Elliott-Larsen Civil Rights Act, Michigan Complied Laws Annotated (MCLA) § 37.2101, *et seq.*
Count VI:	Breach of contract.
Count VII:	Negligence.
Count VIII:	Intentional interference with contractual relations.

II.

On March 28, 1985, defendants responded to Easley's complaint by filing a motion to dismiss. Easley in turn filed an answer and a motion to disqualify Judge Feikens under 28

U.S.C. §§ 144 and 455.[1] Easley sought Judge Feikens' recusal based upon (1) his associations with the University of Michigan Law School, and (2) "his well publicized Negrophobia [as] evidenced by numerous articles questioning the competency of Negros/Blacks." Easley claimed that the Judge was biased because he was a 1941 graduate of the Law School and because he was acquainted with several Law School professors and administrators. Easley's claim of racial bias was predicated upon statements attributed to Judge Feikens in

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[1]Section 144 provides:

> Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.
>
> The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidvait in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

28 U.S.C. § 144.

Section 455 provides in part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

28 U.S.C. § 455.

two columns and an editorial printed in the *Detroit Free Press* in 1984.[2] Judge Feikens denied Easley's motion.

Easley subsequently amended his complaint and, on July 8, 1985, defendants renewed their motion to dismiss and filed an accompanying motion for summary judgment. The court held a hearing on defendants' motions on July 15. Easley appeared at the hearing through counsel and argued against defendants' motions without requesting an opportunity to give a written response. The court thereafter: (1) dismissed the Board of Regents in their official and individual capacities; (2) declined to exercise its discretion to hear the pendent state claims in Counts V, VI, VII, and VIII and dismissed them without prejudice; (3) dismissed Count I without prejudice because it alleged no federal jurisdictional basis; and (4) denied summary judgment and declined to dismiss Counts II, III, and IV. *Easley v. University of Michigan Bd. of Regents*, 619 F. Supp. 418 (E.D. Mich. 1985).

The remaining claims, Counts II, III, and IV, were brought under 42 U.S.C. §§ 1981, 1982, and 1983. Easley first alleged that defendants deprived him of due process by "revoking" or "withholding" his J.D. degree without basis. Under this claim, Easley sought equitable relief ordering defendants to award him a J.D. degree. Second, Easley alleged that University officials violated his fourth and fourteenth amendment rights by allegedly seizing papers from his briefcase during the April 1983 conference on the plagiarism charge. Third, Easley, who is black, alleged that defendants deprived him of a J.D. degree, seized his personal papers, and commenced disciplinary proceedings against him because of his race in violation of the equal protection clause and 42 U.S.C. §§ 1981 and 1982. Easley subsequently claimed that the disciplinary

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[2] *See also In Re City of Detroit*, 828 F.2d 1160 (6th Cir. 1987) (Judge Feikens' refusal to disqualify himself based upon identical allegations of racial bias affirmed on appeal).

proceedings were also brought in retaliation for his exercise of his right to free speech. Easley sought legal relief in the form of damages on the second and third causes of action.

After this court denied Easley's subsequent petition for a writ of mandamus directing Judge Feikens to disqualify himself, the district court held a bifurcated bench trial on Easley's equitable claim. The court found it unnecessary to determine whether Easley's equitable claim was grounded in procedural or substantive due process because based upon its view of the facts, the court concluded, as a matter of law, that since Easley had never completed his degree requirements, he, therefore, never obtained a property interest in a J.D. degree.[3] *Easley v. University of Michigan Bd. of Regents,* 627 F. Supp. 580 (E.D. Mich. 1986). Accordingly, the court denied Easley's claim for injunctive relief and entered a judgment of no cause of action.

Easley renewed his motion to disqualify Judge Feikens and also moved for a new trial before an unbiased judge. The motion was predicated upon the same allegations of bias underlying Easley's earlier unsuccessful motion to disqualify and was apparently filed without the knowledge or consent of Easley's attorney, causing the latter to withdraw. Defendants moved for summary judgment on Easley's remaining legal claims.

Judge Feikens subsequently denied Easley's motions to dis-

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[3] "Whether the facts establish a property interest is a question of law." *Tarabishi* v. *McAlester Regional Hosp.*, 827 F.2d 648, 652 (10th Cir. 1987). "The Fourteenth Amendment's procedural protection of property is a safeguard of the security of interests a person has already acquired in specific benefits. These interests—property interests—may take many forms." *Board of Regents v. Roth,* 408 U.S. 564, 576 (1972) Similarly, "the substantive due process analysis is not triggered unless there is a property or liberty interest taken by state action." *Levitt v. University of Texas at El Paso,* 759 F.2d 1224, 1231 (5th Cir.), *cert. denied,* 474 U.S. 1034).

qualify and for a new trial. *Easley v. University of Michigan Bd. of Regents*, 632 F. Supp. 1539 (E.D. Mich. 1986). Further, after examining the pleadings and documents, and after an extended colloquy with Easley, who was proceeding *pro se* at this point, Judge Feikens granted defendants' motion for summary judgment on Easley's equal protection and first amendment claims and dismissed Easley's search and seizure claim for failure to plead brief, simple, and clear facts showing a basis for relief. *Id.* This appeal followed.

III.

Assuming that Judge Feikens should not have disqualified himself, we find no error in the court's disposition of Easley's equitable and legal claims. However, given the strong interest in promoting public confidence in the integrity of the judicial process, we must look more closely at the affiliations alleged by Easley to determine if Judge Feikens abused his discretion in denying Easley's two motions for disqualification under 28 U.S.C. §§ 144 and 455.

The goal of sections 144 and 455 is to promote public confidence in the judicial system by avoiding even the appearance of partiality. *See Liljeberg v. Health Services Acquisition Corp.*, 56 U.S.L.W. 4637, 4641 (U.S. June 14, 1988), *aff'g*, 796 F.2d 796 (5th Cir. 1986). Sections 144 and 455 "must be construed *in pari materia* . . . . [D]isqualification under § 455(a) must be predicated as previously under § 144, upon extrajudicial conduct rather than on judicial conduct." *United States v. Story*, 716 F.2d 1088, 1091 (6th Cir. 1983) (quoting *City of Cleveland v. Krupansky*, 619 F.2d 576, 578 (6th Cir.), *cert. denied*, 449 U.S. 834 (1980)). Further, "[a]lthough § 144 on its face appears to require automatic disqualification once the affidavit is filed [*see* note 1, *supra*], a district court judge has a duty to examine the affidavit to determine whether it is timely and legally sufficient." *In Re City of Detroit*, 828 F.2d 1160, 1164 n. 2 (6th Cir. 1987) (citing *Berger v. United States*, 255 U.S. 22, 32 (1921)). *Accord*

United States v. Azhocar, 581 F.2d 735, 738 (9th Cir. 1978), *cert. denied*, 440 U.S. 907 (1979).

"The difference between §§ 144 and 455 is that section 455 is self-executing, requiring the judge to disqualify himself for personal bias even in the absence of a party complaint." *United States v. Story*, 716 F.2d at 1091. "Recusal is mandated . . . only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned." *Id.* (quoting *Trotter v. International Longshoremen's and Warehousemen's Union*, 704 F.2d 1141, 1144 (9th Cir. 1983)). *Accord In Re City of Detroit*, 828 F.2d at 1167.

With respect to Judge Feikens' affiliations with the Law School, a reasonable person possessed solely of the facts that the Judge graduated from the School would not question his impartiality. "[A] judge's having attended or graduated from a school, which is a party, without more, is not a reasonable basis for questioning his impartiality." *Brody v. President and Fellows of Harvard College*, 664 F.2d 10, 11 (1st Cir. 1981), *cert. denied*, 455 U.S. 1027 (1982). "All judges come to the bench with a background of experiences, associations, and viewpoints. This background alone is seldom sufficient in itself to provide a reasonable basis for appeal." *Id.* On the other hand, while Judge Feikens' personal and professional associations with the Law School's faculty and administrators may appear equally indicative of the type of inevitable tangential personal relationships which by themselves fail to suggest judicial bias, they may also have unwittingly exposed the Judge, either actually or constructively, to out-of-court information relating to Easley's claims. While "[t]here is as much obligation upon a judge not to recuse himself when there is no occasion as there is for him to do so when there is[,]" *In Re Union Leader Corp.*, 292 F.2d 381, 391 (1st Cir.), *cert. denied*, 368 U.S. 927 (1961), we are of the opinion that a ruling on the propriety of Judge Feikens' refusals to disqualify himself based upon his affiliations with the Law School

and its faculty would be premature at this point in the proceeding because of the limited evidence on record concerning the nature of those affiliations. Accordingly, we order that these matters be further developed through a limited evidentiary hearing to be held on remand, the limits and purposes of which are discussed in Section IV, *infra*.

With respect to Easley's allegations that Judge Feikens is racially biased, we need only state that "[a] bias sufficient to justify recusal must be a personal bias' as distinguished from a judicial one' arising 'out of the judge's background and association' and not from the 'judge's view of the law.' " *United States v. Story*, 716 F.2d at 1090 (quoting *Oliver v. Michigan State Bd. of Educ.*, 508 F.2d 178, 180 (6th Cir. 1974), *cert. denied*, 421 U.S. 963 (1975)). This court has previously determined that the same statements by Judge Feikens which Easley now cites arose from Judge Feikens' judicial experience and "clearly do not evince racial animus or hatred. . . ." *In Re City of Detroit*, 828 F.2d at 1168.[4]

IV.

A related issue was raised by Easley in an "Emergency Motion" filed with this court four days prior to oral argument. Easley sought either to supplement the record with what he

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[4]Indeed, in response to similarly based complaints filed with the Judicial Council of the Sixth Circuit, a committee of the Judicial Council observed that:

> [t]hough Judge Feikens made an untrue and regrettable statement in the course of the interview, the full transcript demonstrates that he had no intention of denigrating black people generally. The treatment by the newspaper of a single sentence from a lengthy interview led to the perception honestly expressed in the complaints. However, the Committee is convinced that this treatment is inconsistent with the general tenor of the interview and with the well known and documented concern of Judge Feikens for racial justice.

In Re City of Detroit, 828 F.2d at 1163 n.1.

claimed to be further evidence of Judge Feikens' alleged bias, or to have the case remanded for a supplemental evidentiary hearing into the matters raised by his motion. In addition to realleging that Judge Feikens graduated from the Law School and is acquainted with several of its faculty and administrators, Easley alleged the following associations between Judge Feikens and the University of Michigan Law School:

> (1) That Jon Feikens, Judge Feikens' son, graduated from the Law School in 1966;
>
> (2) That Jon Feikens and Robert Feikens, also a son of Judge Feikens, are members of Judge Feikens' former law firm, whose client list includes the University of Michigan Hospital;
>
> (3) That Judge Feikens is an active member of the Law School's Committee of Visitors;
>
> (4) That Judge Feikens is an active member of the University of Michigan Club; and
>
> (5) That Judge Feikens served on the Board of Governors of the University of Michigan Fund.

It is clear that Easley's motion is untimely under § 144. Section 144 specifically provides that allegations of bias must be presented in affidavit form and not less than ten days before the beginning of the term at which the proceeding is to be held. *See* note 1, *supra*. Easley has not only failed to present his newly discovered allegations in a timely manner, but he has also failed to present them in affidavit form. Further, Easley presumably filed an affidavit to accompany his initial motion under § 144 in 1985. Section 144 allows a party "only one such affidavit in any case."

Nonetheless, the procedural shortcomings of Easley's motion do not bar our consideration of its merits under the separate disqualification provisions of § 455.

> Section 455(a) is a self-executing provision for the disqualification of federal judges. There is no particular procedure that a party must follow to obtain judicial disqualification under § 455(a). Instead, this section sets forth a mandatory guideline that federal judges must observe *sua sponte*.

Roberts v. Bailar, 625 F.2d 125, 128 (6th Cir. 1980) (footnotes omitted). Further, the fact that Judge Feikens' rulings in the case might be legally correct does not render Easley's motion moot.

> The purpose of the disqualification statute is to avoid even the appearance of impropriety; the appearance of impropriety is not lessened by the fact that the litigation would have come out the same anyway.

Health Serv. Acquisition Corp. v. Liljeberg, 796 F.2d 796, 801 (5th Cir. 1986), *aff'd*, 56 U.S.L.W. 4637 (U.S. June 14, 1988). *Accord* 13A *C. Wright & A. Miller, Federal Practice and Procedure: Civil*, § 3553 at 657 (1984).

The affiliations of Judge Feikens' adult sons with the Law School and his former law firm are patently insufficient to call into question Judge Feikens' own impartiality under § 455.[5] Of the three remaining associations alleged by Easley, the Law School's Committee of Visitors, the University of Michigan Club, and the University of Michigan Fund, we

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[5]Under § 455(b)(2), a federal judge must disqualify himself "[w]here in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such an association as a lawyer concerning the matter. . . ." Easley has failed to allege any prior connection between Judge Feikens, his sons, or his former firm and this case. Further, the fact that the firm numbers the University of Michigan Hospital among his clients is insufficient to give Jon and Robert Feikens "an interest that could be substantially affected by the outcome of [this] proceeding. . . ." 28 U.S.C. § 455(b)(5)(iii).

find Judge Feikens' participation in the Committee of Visitors to be the most potentially troublesome.[6]

The Law School describes the Committee as:

> [A] representative group of alumni [which] meets annually at the Law School to study and evaluate the Law School's operations. The group meets with faculty, administrators and students usually in the fall of the year over a period of three days. During that time the Visitors attend law school classes, visit with faculty, and meet to hear reports on and to discuss the general affairs of the school. The Committee may make suggestions for change or improvement in the operation of the school, but they have no binding effect.

According to the Law School, Judge Feikens actively served on the Committee from July 1981 through June 1985. During this time, school officials charged Easley with cheating and plagiarism, separately conducted extensive hearings on each charge, and ultimately suspended him for plagiarism. If information concerning the charges against Easley, not otherwise made public, was provided to the Committee of Visitors by the Law School during Judge Feikens' tenure on the Committee, then Judge Feikens' impartiality in this case might reasonably be questioned. *See* 28 U.S.C. § 455(a) and (b)(1), at note 1, *supra*.

We do not mean to suggest that Judge Feikens somehow lacked candor in the proceedings below simply because his membership on the Committee has been raised initially on

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[6]The basis for Easley's belief that Judge Feikens is a member of the University of Michigan Fund is a 1953 *Detroit Free Press* article. The University alleges that Judge Feikens' participation on the Fund ceased in 1970 upon his appointment to the federal bench. Further, it is unclear from Easley's motion whether the University of Michigan Club is anything more than a typical alumni organization.

appeal. Indeed, the information about Judge Feilkens' membership on the Board of Visitors and his son's association with his former law firm were obtained by Easley from a biographical resume previously provided by Judge Feikens to the clerk of the district court for distribution to interested members of the public. Rather, we stress that:

> The goal of § 455 is to avoid *even the appearance* of partiality. If it would appear to a reasonable person that a judge has knowledge of facts that would give him an interest in the litigation then an appearance of partiality is created even though no actual partiality exists because the judge does not recall the facts, because the judge actually has no interest in the case or because the judge is pure in heart and incorruptible. The judge's forgetfulness, however, is not the sort of objectively ascertainable fact that can avoid the appearance of partiality. *Hall v. Small Business Administration*, 695 F.2d 175, 179 (5th Cir. 1983). Under section 455(a), therefore, recusal is required even when a judge lacks actual knowledge of the facts indicating his interest or bias in the case if a reasonable person, knowing all the circumstances, would expect that the judge would have actual knowledge.

Liljeberg, 56 U.S.L.W. at 4641 (quoting *Health Service Acquisition Corp. v. Liljeberg, 796 F.2d at 802) (emphasis added).*

We therefore grant Easley's emergency motion for a remand and direct that on remand, the district court shall conduct an evidentiary hearing for the limited purposes of: (1) enlarging the record regarding the nature of Judge Feikens' associations and affiliations with the Law School, its faculty, and its administrators; (2) determining whether Judge Feikens acquired extra-judicial knowledge of matters material to this controversy through these associations, particularly the Law School's Committee of Visitors; and (3)

determining, notwithstanding the court's findings regarding (2) above, whether, because of such associations, Judge Feikens' impartiality in this matter might "reasonably be questioned."

Accordingly, Easley's emergency motion for remand is GRANTED. We RETAIN JURISDICTION and REMAND the case for proceedings consistent with this opinion.

Appendix C

No. 89-1401
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

IN RE: KENDRIX M. EASLEY,
Petitioner.

ORDER

BEFORE: MERRITT, Chief Judge; RYAN, Circuit Judge; and PECK, Senior Circuit Judge

The petitioner seeks a writ of mandamus directing the Honorable John Feikens of the United States District Court for the Eastern District of Michigan to respond to discovery, to attend an evidentiary hearing and to give testimony under cross-examination in proceedings related to a limited remand from this court in appeal no. 86-1483. In response, the district court submitted a letter and a certified copy of the docket sheet.

The remedy of mandamus is a drastic one, to be invoked only in extraordinary situations where the petitioner can shown a clear and indisputable right to the relief sought. *Will* v. *Calvert Fire Ins. Co.*, 437 U.S. 655, 661-62 (1978); *Kerr* v. *United States Dist. Ct. for the Northern Dist. of California*, 426 U.S. 394, 402-03 (1976). Upon review of the petition and response, we conclude that petitioner has not shown that such extraordinary relief is warranted.

It is ORDERED that the petition for a writ of mandamus is denied.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green,
Clerk

Appendix D

No. 86-1483

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

KENDRIX M. EASLEY,
Plaintiff-Appellant,

v.

UNIVERSITY OF MICHIGAN BOARD OF REGENTS; TERRY SANDALOW, Individually, and as Dean of the Law School; et al.
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed July 2, 1990

Before: MERRITT, Chief Judge; RYAN, Circuit Judge; and PECK, Senior Circuit Judge.

RYAN, Circuit Judge. Kendrix M. Easley has been engaged in an ongoing effort to obtain, through litigation, a law degree and damages from The University of Michigan. The history of the case, and our final disposition of all the issues previously raised, save one, may be found in *Easley v. Univ. of Michigan Bd. of Regents, et al.*, 853 F.2d 1351 (6th Cir. 1988). The one issue not resolved in *Easley* is the plaintiff's appeal of the refusal of the district judge who tried the case, Honorable John Feikens, to recuse himself. We declined to resolve

that issue on the record before us when the district court's judgment was first appealed and we remanded the matter with instructions to the district court to conduct a hearing, enlarge the record, and make specific findings of fact and conclusions of law relating to the claim that Judge Feikens abused his discretion in declining to recuse himself under the provisions of 28 U.S.C. §§ 144 and 455. We retained jurisdiction.

The Honorable Barbara Hackett conducted the required hearing and concluded in a written opinion that Judge Feikens did not abuse his discretion in denying the recusal motion. For the reasons that follow, we resolve the recusal issue against the appellant, deny the emergency motion for recusal, and affirm the judgment of the district court at 632 F. Supp. 1539 (E.D. Mich. 1986).

For the reader's convenience, we shall recount briefly such details of the case as are necessary to an understanding of the recusal issue and the context in which it is presented.

I.

On November 21, 1984, appellant Easley, formerly a student at The University of Michigan School of Law, but who was suspended for plagiarism,[1] filed an eight-count complaint in the United States District Court for the Eastern District of Michigan against a number of officials of the University. In *Easley*, we described the appellant's eight claims as follows:

Count I: The University of Michigan lacks jurisdiction and authority to rescind a degree.

Count II: A violation of procedural due process and rights secured by the fourth amendment.

---

[1]At the time of his suspension, Easley had earned all but one credit required for a law degree.

Count III: A violation of substantive due process.

Count IV: Race discrimination.

Count V: A violation of the Elliott-Larsen Civil Rights Act, Michigan Complied Laws Annotated (MCLA) § 37.2101, *et seq.*

Count VI: Breach of contract.

Count VII: Negligence.

Count VIII: Intentional interference with contractual relations.

853 F.2d at 1353-54.

Defendants moved to dismiss the complaint and Easley responded. In addition, he filed a motion to disqualify Judge Feikens based upon the Judge's association with the University's Law School and "his well-publicized Negrophobia."

Prior to trial, the court dismissed Count I of the complaint because it alleged no basis for federal jurisdiction, denied summary judgment, declined to dismiss Counts II, III and IV, and declined to exercise pendant jurisdiction over the state law claims alleged in Counts V, VI, VII and VIII, 619 F. Supp. 418 (E.D. Mich. 1985), dismissing those claims without prejudice.

For an understanding of what occurred next, we burden this opinion with a quotation from a portion of what we said in *Easley*:

> After this court denied Easley's subsequent petition for a writ of mandamus directing Judge Feikens to disqualify himself, the district court held a bifurcated bench trial on Easley's equitable claim. The court found it unnecessary to determine whether Easley's equitable claim was grounded in procedural or substantive due process because based upon its view of the facts, the court concluded, as a matter

of law, that since Easley had never completed his degree requirements, he, therefore, never obtained a property interest in a J.D. degree. *Easley v. University of Michigan Bd. of Regents,* 627 F.Supp. 580 (E.D. Mich.1986). Accordingly, the court denied Easley's claim for injunctive relief and entered a judgment of no cause of action.

Easley renewed his motion to disqualify Judge Feikens and also moved for a new trial before an unbiased judge. The motion was predicated upon the same allegations of bias underlying Easley's earlier unsuccessful motion to disqualify and was apparently filed without the knowledge or consent of Easley's attorney, causing the latter to withdraw. Defendants moved for summary judgment on Easley's remaining legal claims.

Judge Feikens subsequently denied Easley's motions to disqualify and for a new trial. *Easley v. University of Michigan Bd. of Regents,* 632 F.Supp. 1539 (E.D.Mich.1986). Further, after examining the pleadings and documents, and after an extended colloquy with Easley, who was proceeding *pro se* at this point, Judge Feikens granted defendants' motion for summary judgment on Easley's equal protection and first amendment claims and dismissed Easley's search and seizure claim for failure to plead brief, simple, and clear facts showing a basis for relief. *Id.* This appeal followed.

853 F.2d at 1355 (footnote omitted).

We then rejected Easley's appeal on the substantive issues, concluding:

Assuming that Judge Feikens should not have disqualified himself, we find no error in the court's disposition of Easley's equitable and legal claims. How-

> ever, given the strong interest in promoting public confidence in the integrity of the judicial process, we must look more closely at the affiliations alleged by Easley to determine if Judge Feikens abused his discretion in denying Easley's two motions for disqualification under 28 U.S.C. §§ 144 and 455.

853 F.2d at 1355.

In parts III. and IV. of our opinion in *Easley*, 853 F.2d at 1355, *et seq.*, we discussed in detail Easley's motions to disqualify Judge Feikens under 28 U.S.C. §§ 144 and 455. We observed that Easley made a number of allegations in support of his motion for recusal relating to Judge Feikens' alleged association with The University of Michigan and his alleged racial bias. We rejected Easley's claim of racial bias as entirely unwarranted and then turned to the allegations of Judge Feikens' association with The University of Michigan.

We noted that while some of the grounds advanced for seeking Judge Feikens' disqualification on the basis of his own and his sons' affiliation with The University of Michigan are patently meritless, out of an abundance of caution, others deserved scrutiny on remand. That "abundance of caution," we said, derived principally from "the strong interest in promoting public confidence in the integrity of the judicial process." To fully protect that "strong interest," we reserved our decision on the recusal issue as it relates to Judge Feikens' alleged association with the University and remanded the matter to the district court. We directed that:

> [T]he district court shall conduct an evidentiary hearing for the limited purposes of (1) enlarging the record regarding the nature of Judge Feikens' associations and affiliations with the Law School, its faculty, and its administrators; (2) determining whether Judge Feikens acquired extra-judicial knowledge of matters material to this controversy through these

> associations, particularly the Law School's Committee of Visitors; and (3) determining, notwithstanding the court's findings regarding (2) above, whether, because of such associations, Judge Feikens' impartiality in this matter might "reasonably be questioned."

853 F.2d at 1358.

Prior to the hearing on remand, appellant filed a number of requests to obtain discovery through interrogatories, requests for admissions, and depositions upon oral examination. In a scheduling order dated January 13, 1989, Judge Hackett set the closing date for discovery at March 6, 1989, limited the form of discovery to interrogatories and request for production of documents, and set a date for the evidentiary hearing at which "[a]n opportunity for examination of witnesses will be available." On February 17, 1989, the district court denied Easley's motion to modify the scheduling order to permit "depositions upon oral examination" and "requests for admissions" for the reason that Easley was not being denied access to information. On March 9, 1989, in response to defendants' objection to certain of Easley's interrogatories, the district court granted defendants a protective order because they

> have complied with the discovery order entered by the court and have made available to plaintiff requested information relative to the subject matter to be developed during the evidentiary hearing . . . .

On that date, and for the same reason, the district court also denied Easley's motion to compel discovery and his request for sanctions against the defendants.

Pursuant to discovery, Judge Feikens submitted an affidavit defining the scope of his affiliations with The University of Michigan. He stated that he is an alumnus of the Law

School; that he was a volunteer fundraiser for the Law School Fund in 1964; that since 1981 he has been a member of the Committee of Visitors of The University of Michigan Law School, the purposes of which are essentially social and informational; that he did not participate in board affairs during the period in which Easley's case was pending before him; and that he is a member of The University of Michigan Club of Detroit through which he participates in athletics-related social events.

In response to Easley's interrogatories, the six individual defendants, administrators and faculty members at The University of Michigan, candidly detailed their associations with Judge Feikens. And, The University of Michigan, as a defendant, produced materials describing the purpose and activities of the Committee of Visitors, corroborating the disclosures Judge Feikens made in his affidavit.

On April 17, 1989, Judge Hackett conducted an evidentiary hearing. In a written "Findings and Conclusions" issued that same day, she stated, in relevant part:

> 1) The record regarding the nature of Judge Feikens' associations with the law school, its faculty, and its administrators has been enlarged and a hearing held which allowed the parties an opportunity to state their positions in this matter; 2) Examination of witnesses during the hearing was not permitted because plaintiff was unable to identify a single fact in dispute, other than his conclusory allegations that all documents provided were false and that all involved in this matter had lied, as evidence in the transcript of the hearing held in this matter; 3) Nothing in this record supports a finding that Judge Feikens acquired actual or constructive extrajudicial knowledge of matters material to this controversy through his various associations with The University of Michigan or its law school; 4) Nothing

in this record supports a finding that the judge's impartiality might reasonably be questioned, other than plaintiff's conclusory allegations.

II.

A.

After receiving copies of Judge Hackett's findings of fact and conclusions of law, the parties filed supplemental briefs in this court. Appellant's brief, consistent with the pattern that has marked his approach to this litigation from the beginning, focuses upon his objections to the district court's calendaring decisions, discovery orders, and procedural rulings relating to the evidentiary hearing on remand, and not upon the substantive issues for which the remand was ordered. Appellant frames four issues in his supplemental brief, no one of which is addressed to the specific purposes for which we ordered remand to the district court, or to the substance of Judge Hackett's findings that Judge Feikens did not abuse his discretion in declining to grant appellant's motion for recusal. Although appellant has not addressed in his supplemental brief the issues for which we remanded the matter to the district court, we have carefully examined, nevertheless, each of his four assignments of error relating to the procedures employed by Judge Hackett in conducting the mandated evidentiary hearing, and we conclude that none of the issues raised in appellant's supplemental brief have the slightest merit.

We turn, therefore, to the final issue left unresolved in *Easley*: Whether Judge Feikens abused his discretion in denying appellant's motion for recusal on the basis of the Judge's alleged associations with The University of Michigan. We consider the issue, having in mind the rule that:

> Recusal is mandated . . . only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be ques-

tioned. *See Trotter v. Int'l Longshoremen's & Warehousemen's Union,* 704 F.2d 1141 (9th Cir. 1983).

B.

To repeat, our three instructions to the district court on remand were: 1) to enlarge the record regarding Judge Feiken's affiliations with the Law School; 2) to determine whether Judge Feikens obtained extra-judicial knowledge of Easley's case; and 3) to decide whether Judge Feikens' impartiality might be reasonably questioned in this case. These instructions were formulated with particular concern for the provisions of 28 U.S.C. § 455, which states in pertinent part:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> . . . .

The record as enlarged below consists of Judge Feikens' affidavit, affidavits of the defendants and several University of Michigan employees responding to Easley's interrogatories, and other materials supplied by the defendants in response to Easley's requests for documents. Judge Hackett invited Easley to bolster his allegations of bias with further evidence, but Easley failed to produce anything. Hence, the district court fully complied with our first instruction on remand.

Nothing in the expanded record suggests that Judge Feikens was privy to extra-judicial information relating to

Easley's situation at The University of Michigan Law School or to his claim against the University based on his affiliations with the Law School. Repeating Judge Hackett's third finding:

> Nothing in this record supports a finding that Judge Feikens acquired actual or constructive extra-judicial knowledge of matters material to this controversy through his various associations with The University of Michigan or its law school.

Hence, the district court complied with our second instruction on remand.

Nor does the current record support Easley's unsubstantiated assertion that Judge Feikens' impartiality should be questioned. Judge Hackett specifically found:

> Nothing in this record supports a finding that the judge's impartiality might reasonably be questioned, other than plaintiff's conclusory allegations.

Hence, the district court complied with our third instruction on remand.

Having been provided the necessary supplements to our prior decision, we now hold that Judge Feikens did not abuse his discretion in refusing to recuse himself from Easley's litigation with The University of Michigan, pursuant to Easley's 28 U.S.C. §§ 144 and 455 claims. Without more, the amicable feelings Judge Feikens undoubtedly has for his alma mater, The University of Michigan, fail to demonstrate a sufficient basis for his recusal. *See Brody v. President & Fellows of Harvard College,* 664 F.2d 10, 11 (1st Cir. 1981).

III.

For the foregoing reasons, we **AFFIRM** the decision of the district court.

Appendix E

No. 86-1483/89-1401
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

KENDRIX M. EASLEY,
Plaintiff-Appellant,

v.

UNIVERSITY OF MICHIGAN
BOARD OF REGENTS, et al.,
Defendants-Appellees

ORDER

IN RE: KENDRIX M. EASLEY,
Petitioner

BEFORE: MERRITT, Chief Judge; RYAN, Circuit Judge; and PECK, Senior Circuit Judge.

The Court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this Court, and no judge of this Court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original hearing panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied.

ENTERED BY ORDER OF THE COURT
(s) Leonard Green,
Clerk

Appendix F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

KENDRIX M. EASLEY,
Plaintiff,

-vs-

UNIVERSITY OF MICHIGAN BOARD OF REGENTS, et al.,
Defendants.

Civil Action No. 84-7560-AA
Hon. John Feikens
(U.S. Court of Appeals for the Sixth Circuit Matter - No. 84-1483
Hon. Barbara Hackett)

AFFIDAVIT OF JOHN FEIKENS

STATE OF MICHIGAN)
) SS
COUNTY OF WAYNE)

In this case on appeal to the United States Court of Appeals for the Sixth Circuit, an opinion and order have been entered remanding this case to the district court so that an evidentiary hearing can be conducted for the limited purposes of "(1) enlarging the record regarding the nature of Judge Feikens' associations and affiliations with the Law School, its faculty, and its administrators; (2) determining whether Judge Feikens acquired extra-judicial knowledge of matters material to this controversy through these associations, particularly the Law School's Committee of Visitors; . . . . "

In accordance therewith, affiant states:

1. That he is a graduate of the University of Michigan Law School, having graduated in 1941; that this case was assigned to him on December 7, 1984 as a judge of this court when Judge Charles E. Joiner recused himself.

2. That at that time he was a member of the Committee of Visitors of The University of Michigan Law School and has been

so since 1981; that the purpose and function of the Committee of Visitors is essentially social and informative; that the Committee meets once per year and did so at all times material hereto; that an agenda of a typical meeting is attached reflecting the nature of the matters which Committee membership involves.

3. That during the time from December 7, 1984, the date upon which this case was assigned to him, until he entered the final opinion, on January 29, 1986, he in no way participated in the activities of the Committee of Visitors. He did not attend the annual meeting of the Committee of Visitors on October 24-26, 1985. He received no extra-judicial knowledge of matters material to this case from his membership on the Committee.

4. That on information, and believing it to be true, no matters involved in cases such as this are ever discussed in the meetings of the Committee of Visitors.

5. That while he is an active member of the University of Michigan Club of Detroit, his activities in this Club are confined solely to social activities pertaining to athletics and in no way involve the Law School; and that he received no extra-judicial knowledge of matters material to this case from membership in that Club.

6. That he has no knowledge of the existence of a Board of Governors of The University of Michigan Fund; and, in any event, that should such a board exist, he has no membership in it; that in approximately the year 1964 he did serve as a fund raiser for the Law School Fund, an annual drive which seeks financial support for the University of Michigan Law School from its alumni.

7. That during the time that this case was on his docket, he had no contact concerning this case with the faculty or the administrators of the Law School.

8. That he makes this affidavit of his own knowledge and is competent to testify as to the matters raised herein.

(s) John Feikens
United States District Judge

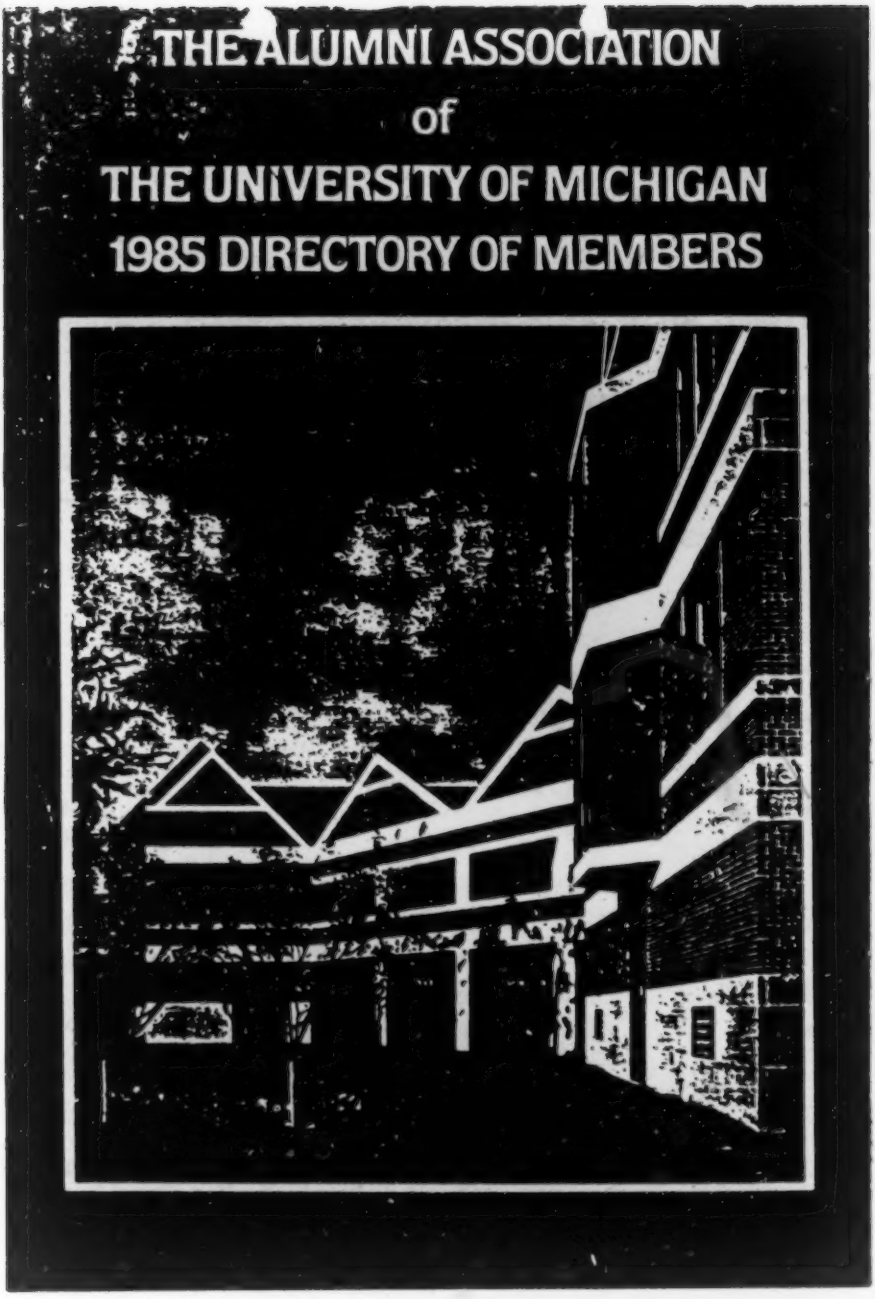
DATED:

COUNTY OF WAYNE)
) SS
STATE OF MICHIGAN)

Subscribed and sworn to before me this 1st day of December, 1988.

Subscribed and sworn to before me
this 1st day of December, 1988.
(s) Vita DiMaria
Notary Public
My Commission Expires:
10/21/91

Appendix G


THE ALUMNI ASSOCIATION
of
THE UNIVERSITY OF MICHIGAN
1985 DIRECTORY OF MEMBERS

Appendix G

FEIGLEY Margaret D MS 46 *Racnam* A. 12505 Village Cir Dr #460 St Louis MO 63127 (314) 525 7460

FEIKENS Hon John JD '41 *Law* A. 10750 Roanoke, Manchester MI 48158 (313) 428 7111 ; US Dist Ct Judge Detroit MI 48226

FEIKENS Jon JD 67 *Law* A. 2362 Park Ridge Dr Bloomfield Hills MI 48013 (313) 332 9648 ; Partner Dice Sweeney & Sullivan 1200 Buhl Bldg Detroit, MI 48226. (313) 962 5909

FEILER Mrs Jane A. (ADesnouse Jane Carol) BSD 58 *Art* A EEW 58 *Education* A. 330 Lee Blvd Savannah GA 31405 (912) 354 0111 ; VP Metro Developers inc 120 Habersham St Savannah GA 31499. (912) 232 6444

FEILER Mrs Julian D BA 43 *LSA* A EEL '59 *Education* A 2607 Cir Dr. Flint, MI 48507. (313) 742 4895

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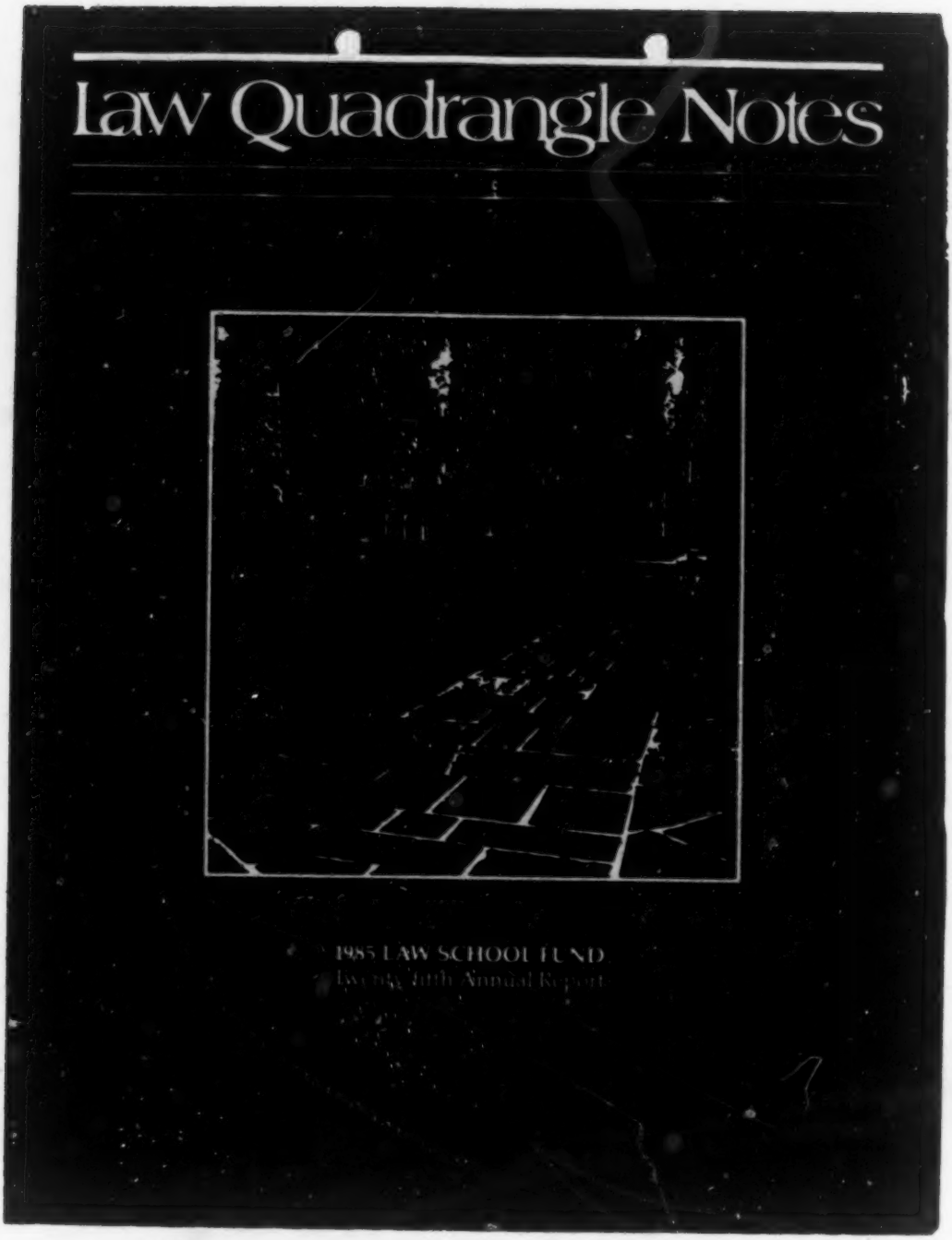
FEIN Mrs Joshua T BS 83 *LSA* A #6A Peabody Ct Baltimore MD 21234

FEINBERG Mrs Carol A BA 64 *LSA* A 941 Park Ave #6A New York NY 10028 (303) 789 0881

FEINBERG Daniel A BSE 78 *Engineering* A. 5986 Simms St Arvada CO 80004 (303) 423 4236 ; Process Engr Solar Energy Research Inst 1617 Cole Blvd. Golden, CO 80401 (303) 231 1003

Appendix H


Law Quadrangle Notes
1985 LAW SCHOOL FUND
Twenty-fifth Annual Report

Appendix H

C O N T R I B U T O R S

Harold E. Fawcett '36
Peter V. Fazio, Jr. '64
Bruce Featherstone '77
Glen A. Featherstun '67
Fred J. Fechheimer '64
James P. Feeney '71
Richard N. Feferma~ '71
Michael R. Fegen '66
James B. Feibel '59
John Feikens '41
Jon Feikens '67
Norman E. Feinberg '51
W. Anthony Feiock '69
Murray J. Fenwell '63
Frederick L. Feldkamp '71
John Calvin Feldkamp '65
Jill A. Feldman '76
Michael H. Feldman '82

(2)

No. 90-1087

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1990

KENDRIX M. EASLEY,
Petitioner

v

THE UNIVERSITY OF MICHIGAN ET AL.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

I. IS THERE A CONFLICT BETWEEN THE SIXTH CIRCUIT'S DECISION AND THE DECISIONS OF THIS COURT OR THE OTHER CIRCUITS?

II. DID JUDGE FEIKENS ABUSE HIS DISCRETION IN REFUSING TO RECUSE HIMSELF?

RULE 29.1 STATEMENT

The Regents of the University of Michigan is a constitutional body corporate created under Michigan Constitution 1963, Art 8, §5. It has no parent or subsidiary companies.

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TABLE OF AUTHORITIES

STATUTES

CASES

RESPONDENT'S BRIEF IN OPPOSITION

Respondents, Regents of the University of Michigan and six individual members of its faculty and administrators (jointly referred to as the "University"), respectfully request that this Court deny the petition for a writ of certiorari seeking review of the opinion of the United States Court of Appeals for the Sixth Circuit ("Sixth Circuit") in this case. The opinions are reported at 906 F.2d 1143 (6th Cir. 1990) and 853 F.2d 1351 (6th Cir. 1988).

STATEMENT OF THE CASE

Plaintiff Kendrix Easley ("Easley") was a law student at the University of Michigan Law School. In August 1983, after earning 80 credit hours (1 credit hour short of the 81 credit hours required for a J.D. degree), Easley was suspended from the Law School for one year when he was found guilty of plagiarism. Despite the fact that he still had the opportunity to earn one more credit and his J.D. degree, on November 21, 1984, Easley filed suit in the United States District Court for the Eastern District of Michigan ("District Court") claiming he was wrongfully deprived of his J.D. degree.[1]

STATEMENT OF THE PROCEEDINGS

As discussed below, Easley made numerous unsuccessful attempts to have the District Court Judge, John Feikens, disqualified. The University prevailed in the District Court and Easley appealed to the Sixth Circuit. The Sixth Circuit affirmed the dismissal of Easley's claims but remanded the case for purposes of enlarging the record on Judge Feikens' alleged affiliations with the University. The District Court on remand found Judge Feikens to be impartial and the Sixth Circuit affirmed. Easley is

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[1] The University adopts the discussion of the facts contained in the Sixth Circuit's opinion (Pet. 6a-8a) as its counterstatement to Easley's view of the facts in his Statement of the Case.

now asking this Court to grant certiorari to review this determination of impartiality.

The District Court

In the original trial, Easley first moved to disqualify Judge Feikens under 28 U.S.C. §§144 and 455, claiming that Judge Feikens should recuse himself because of his associations with the University of Michigan Law School and "his well publicized Negrophobia". Judge Feikens denied the motion. (Pet. 1a).[2] The Sixth Circuit then denied Easley's petition for a writ of mandamus directing Judge Feikens to disqualify himself. Easley later filed in District Court a second motion to disqualify and also a motion for a new trial in front of an unbiased judge, which were denied by Judge Feikens. *Easley v. University of Michigan Board of Regents*, 632 F.Supp. 1539 (E.D. Mich. 1986).

On Appeal to the Sixth Circuit

On appeal, the Sixth Circuit found no error in the District Court's disposition of Easley's equitable and legal claims. (Pet. 11a). With respect to the denial of the motions to disqualify, the Sixth Circuit held that it had previously determined that the statements relied upon by Easley in claiming racial bias arose from Judge Feikens' judicial experience and did not evince racial animus or justify recusal. (Pet. 13a). Easley is not seeking review of this holding in his petition.

In response to Easley's "Emergency Motion to Accept Further Evidence of Judge John Feikens Flagrant Conflict of Interest", the Sixth Circuit held that the fact that Judge Feikens graduated from the University of Michigan Law School would not cause a reasonable person to question his impartiality and that the affiliations of Judge Feikens' adult sons with the Law School were

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[2] References to (Pet.) are to Easley's Petition for Writ of Certiorari. References to R are to the Trial Docket number of a document or pleading. An identifying word after the document number is added where the numbers are inexact.

"patently insufficient to call into question Judge Feikens' own impartiality under §455." (Pet. 15a).

The Sixth Circuit, however, remanded the case to District Court Judge Barbara Hackett to (1) enlarge the record regarding the nature of Judge Feikens' associations and affiliations with the Law School, its faculty and administrators; (2) determine whether Judge Feikens acquired extra-judicial knowledge of matters material to this controversy; and (3) determine whether, because of such associations, Judge Feikens' impartiality in this matter might "reasonably be questioned." (Pet. 17a-18a).

On Remand to the District Court

The Proceedings on Remand. On remand, Judge Hackett required Judge Feikens to submit an affidavit regarding his affiliations with the University of Michigan. Judge Hackett also narrowed the means of discovery to interrogatories and requests for production of documents in order to protect the parties from unduly burdensome discovery. (R98; R114).

Easley served seven sets of interrogatories and two requests for production of documents on the University (R95; R115; R97; R100 St Antoine; R101 Eklund; R102 Munroe; R104 Pooley; R106; R107 Westen). Plaintiff also served interrogatories for Lillian Fritzler, a University employee. (R99).

The University responded to all these requests but filed objections to some of the discovery requests and asked for a protective order. Easley filed a motion to compel the discovery unanswered by the University. (R112; R116). The District Court granted the protective order and denied the motion to compel because the discovery requested was irrelevant, and Easley had failed to show that he was being denied access to pertinent material. (R133; R134).

The University reported that they would not call any affirmative witnesses at the evidentiary hearing scheduled by Judge

Hackett. (R129). Easley filed a witness list describing the testimony of each intended witness in one of the following ways:

> Testimony unknown, failed to answer discovery.
>
> Testimony will discuss Judge Feikens' numerous associations and affiliations with the University of Michigan and his intimate involvement in the operations of the Law School.
>
> Testimony will discuss Judge Feikens' involvement with the University of Michigan. (R135).

The University served interrogatories on Easley asking (1) the substance of questions to be addressed to each witness, (2) through which witnesses Easley would establish the allegations of bias, (3) what Easley intended to establish by the testimony of each Defendant, and (4) which of the facts established through discovery that Plaintiff intended to contest. (R143). Judge Hackett ordered Easley to answer the interrogatories. (R157).

On the morning of the evidentiary hearing, Easley gave Judge Hackett a motion for reconsideration of her order requiring Easley to answer the University's Interrogatories. (R161). At the hearing, Judge Hackett asked Easley *18 times* to proffer some specific fact that he wished to present, a fact that he wished to contradict, a fact that he wished to ask a witness or Defendant about, or a fact which would support his allegations. (R161: p.9, 1.20; p.10, 1.14; p.11, 1.16; p.12, 1.3; p.12, 1.24; p.13, 1.12; p.17, 1.16; p.18, 1.23; p.19, 1.22; p.20, 1.18; p.21, 1.8; p.22, 1.3; p.22, 1.22; p.25, 1.5; p.25, 1.15; p.27, 1.16; p.28, 1.1; p.30, 1.150).

Each time Easley responded with a generality that the affidavits were false and the affiants lying; or argued that he was the victim of improper procedure, i.e., unresponsive and incomplete discovery, need for depositions and admissions, irregular opening statements, etc., or that all would be disclosed on cross-examination. (R161, *supra*).

Judge Hackett finally told Easley that she was prepared to rule on the present record unless he offered something more than

the general allegations of lying. Easley stated that he had "already expressed the facts he had." (R161). Judge Hackett subsequently issued written "Findings and Conclusions" where she stated that the record regarding Judge Feikens' affiliations with the Law School had been enlarged and the parties provided an opportunity to state their positions; examination of witnesses was not permitted at the evidentiary hearing because Easley was not able to identify a single fact in dispute, other than his conclusory allegations that all documents provided were false and that all involved in this matter had lied; nothing in the record supported a finding that Judge Feikens acquired actual or constructive extra-judicial knowledge of matters material to the Easley case; and nothing in the record supported a finding that Judge Feikens' impartially might reasonably be questioned, other than Easley's conclusory allegations. (R160).

The Record Developed on Remand. The record developed in the proceedings on remand showed that Judge Feikens served as a volunteer fundraiser for the University of Michigan Law School Fund in *1964*, some 20 years before the hearing in this matter. (Pet. 31a; R110). No evidence was presented to suggest that Judge Feikens ever served on the Board of Governors of the University Fund. (Pet. 32a; R110). Judge Feikens is an active member of the University of Michigan Club of Detroit through which he participates in social events related to athletics. (Pet. 32a).

The record also showed that Judge Feikens did not have a close association with any of the six Law School faculty and administrators to whom Easley sent interrogatories. One had never met Judge Feikens (R131 Westen, No. 11), and one had never seen Judge Feikens other than during the trial of this matter. (R124 Munroe, No. 9). The other four candidly disclosed where and when they had encountered Judge Feikens at professional or public events, and the substances of any conversations. (R119 St. Antoine, Nos. 9-12; R123 Eklund Nos. 9, 13-14; R127

Pooley Nos. 6, 10-13). Dean Sandalow had the closest association, having once gone to the Feikens home for dinner.[3]

The record showed that Judge Feikens had continuously been a member of the Law School Committee of Visitors from 1981 to the present, and that the purpose of the committee is social and informational. (Pet. 31a-32a). In 1984, the year prior to the commencement of this lawsuit, the Committee had 205 members, the three day meetings consisted of informal social events and visits to classes, and formal business meetings and small group discussions of admissions, financial aid, curriculum and faculty research. (R111, pp. 1-14). Materials sent to all attendees consisted of reports about the subject for group discussions. (R111, pp. 17-123).

The record further showed that the faculty and staff at the Law School made no communication to the Committee of Visitors or others regarding this case. Disciplinary matters are confidential to those persons having some role in the matter and the Faculty Committee for Professional Responsibility. (R110; R123 Eklund, No. 21; R127 Pooley, No. 18; R131 Westen, No. 18). Moreover, Judge Feikens did *not* attend the Committee of Visitor meetings in 1985 during the pendency of this case before him. (Pet. 32a; R111, No. 17). ***It was absolutely uncontroverted, therefore, that Judge Feikens received no extra-judicial communications regarding this case through his affiliation with the Committee of Visitors or elsewhere.***

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[3] Contrary to Easley's assertion in his Petition (Pet. 14), Dean Sandalow was not a dinner guest of Judge Feikens during the pendency of this lawsuit. In his answers to Easley's interrogatories Dean Sandalow detailed the nature of his contacts with Judge Feikens between 1983 and 1987. He stated that from 1983 to 1987, his contacts with Judge Feikens were limited to correspondence and meetings (with 41-55 others present) regarding the Law School's Committee of Visitors, participation as a party in *Picozzi v. Sandalow*, and professional functions or "around town." (R110 Sandalow, No. 14). His contacts with Judge Feikens between 1983 and 1987 did not include a dinner at Judge Feikens' house.

Sixth Circuit

After District Court Judge Hackett issued her findings, the parties filed supplemental briefs in the Sixth Circuit. In his brief, Easley raised several procedural issues regarding the remand proceedings but did not address the substantive issues regarding Judge Feikens' impartiality.

The Sixth Circuit concluded that the procedural issues raised by Easley did not have the "slightest merit." (Pet. 28a). The Sixth Circuit then concluded upon reviewing the District Court's findings of fact and conclusions of law that Judge Feikens did not abuse his discretion in refusing to recuse himself. (Pet. 28a-29a).

REASONS FOR DENYING THE PETITION

I. THERE IS NO CONFLICT BETWEEN THE SIXTH CIRCUIT'S DECISION AND THE DECISIONS OF THIS COURT OR THE OTHER CIRCUITS.

Easley asserts that the Sixth Circuit's opinion "deviates significantly" from decisions of this Court and previous decisions of the Sixth Circuit and raises a "conflict with current authority." However, Easley fails to identify even *one* decision of this Court or any other court which conflicts with the Sixth Circuit's opinion.

Instead, the Sixth Circuit, consistent with the string of cases cited by Easley, held:

> Recusal is mandated. . .only if a reasonable person with knowledge of all the facts would conclude that the judge's impartiality might reasonably be questioned. *See Trotter v. Int'l. Longshoremen's & Warehousemen's Union,* 704 F.2d 1141 (9th cir. 1983).

(Pet. 28a-29a). The differences, if any, between the Sixth Circuit's opinion and the opinions of other courts relate to differences in factual situations.

Rather than demonstrating a real conflict, Easley is actually arguing that the District Court, both initially and on remand, made erroneous findings of fact and that the Sixth Circuit improperly affirmed these erroneous findings of fact. In his Petition, Easley argues that Judge Feikens had ex parte communications with one of the Defendants. (Pet. 18). The District Court on remand, however, found that there was no evidence that Judge Feikens acquired any actual or constructive extra-judicial knowledge of matters material to this controversy through his various associations with the University and its Law School.[4] Easley, therefore, is simply arguing that the Sixth Circuit decision

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[4] Easley's discovery showed that any ex parte communications between the Defendants and Judge Feikens did *not* concern or involve any discussion of Easley or this litigation.

below was erroneous. He has not shown that it is vital that the issue regarding Judge Feikens' impartiality be decided finally by this Court.

The decision below turns solely upon the facts in this case, i.e., did Judge Feikens obtain extra-judicial knowledge of material matters, what was the nature of his contacts with the University, were those contact sufficient so that a reasonable person would have factual grounds based on objective appearances to doubt the impartiality of the judge. The outcome of this case, because it turns on its own facts, will affect few other than Easley. Easley is simply asking for another level of review to review evidence and discuss the specific facts of this case. This clearly does not warrant the grant of certiorari and Easley's petition should, therefore, be denied.

II. JUDGE FEIKENS DID NOT ABUSE HIS DISCRETION IN REFUSING TO RECUSE HIMSELF.

The Court has long required precaution against abuse in charging a judge with bias and against the unresponsibility of unsupported opinion. *Berger v. United States,* 255 U.S. 22, 33 (1920). A judge is presumed to be qualified, and a party has a substantial burden to show grounds for believing the contrary. *In re Union Leader Corp.,* 292 F.2d 381, 389 (1st Cir. 1961).

The Sixth Circuit remanded to the District Court to enlarge the record in order to determine whether Judge Feikens had abused his discretion in refusing to recuse himself pursuant to 28 U.S.C. §455, which states:

> (a) Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned.
>
> (b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding. . . .

In this case, Easley has repeatedly made totally unsubstantiated allegations charging Judge Feikens with bias. Contrary to the assertions in Easley's petition, Easley had the opportunity to develop a "full. . .record of the basis for disqualification." In fact, Easley was afforded *two* opportunities to develop and produce evidence of grounds for recusal: first in the initial proceedings before Judge Feikens, and later in the remand proceedings before Judge Hackett.

Easley took advantage of these opportunities and on remand conducted quite extensive discovery by serving seven sets of interrogatories and two requests for production of documents. Judge Feikens also provided an affidavit setting forth his associations with the Law School. While Judge Hackett limited the *means* by which Easley conducted discovery, he clearly was not denied discovery on the issue of Judge Feikens' impartiality. He also was given the opportunity to present any relevent evidence on this issue. He was prevented from presenting witnesses at the evidentiary hearing but only because he failed 18 times in response to Judge Hackett's questions to identify a specific fact he wished to present, a fact he wished to contradict, a fact he wanted to ask a witness about, or a fact that would support his allegations. Despite all these opportunities, Easley failed to offer any *evidence,* both to Judge Feikens before the appeal, and on remand to Judge Hackett, to substantiate his "unsupported opinion" that Judge Feikens should not be presumed to be qualified to hear this case.

In response to Easley's discovery requests, the individual Defendants candidly detailed their associations or nonassociations with Judge Feikens. Not one of the Defendants has a close association with Judge Feikens. Their associations generally arose from being members of the same legal profession in the State of Michigan.

In addition, Judge Feikens' "affiliations" with the Law School are tangential as a matter of law. Judge Feikens' affidavit states that the Committee of Visitors of the University of Michigan Law School serves essentially a social and informational function. The number of committee members, the number of

attendees, and the agenda of activities produced in response to Easley's discovery all corroborate this characterization of the Committee by Judge Feikens.

Likewise, Judge Feikens' membership in the University of Michigan Club of Detroit, essentially a social club, suggests nothing more than an amicable feeling a judge may have toward a wide range of community institutions which may be litigants. *Brody v. President & Fellows of Harvard College,* 664 F.2d 10, 11 (1st Cir. 1981).

His 1964 fundraising activity for the Law School Fund, even if it were significant, was too remote in time to require recusal. *United States v. Story,* 716 F.2d 1088, 1089 (6th Cir. 1983). Easley failed to establish and Judge Feikens denied membership on a Board of Governors of the University of Michigan Fund. (Pet. 35a).

The evidence was also uncontroverted that none of the Defendants discussed, or had occasion to discuss, the Easley matter with Judge Feikens. It was further uncontroverted that any discussion of the Easley matter outside of the Faculty Committee for Professional Responsibility (the committee hearing the matter) would be contrary to Law School policy. This evidence, and the evidence that the University abided by the policy, corroborated Judge Feikens' affidavit statement that he received no extra-judicial knowledge of the matters material to this case. (Pet. 33a-35a). Easley offered no evidence, aside from bald assertions, to rebut this conclusion.

Judge Feikens volunteered by affidavit disclosure of all his associations with the Law School, its faculty and administrators. Easley had an opportunity to ask Defendants and others all of the relevent questions he desired. Easley had the opportunity to bring other witnesses and evidence to present to the District Court on remand to rebut the evidence disclosed through discovery, but he failed to do so. The record below clearly reflected all of Judge Feikens' relations with the University, the Law School and its personnel. There clearly was no evidence of personal bias or

prejudice or of personal knowledge of disputed evidentiary facts concerning the proceedings.

The record also clearly shows that all of the Judge Feikens' contacts with the University, the Law School and its personnel were not sufficient to cause a reasonable observer to doubt Judge Feikens' ability to pass impartially on the issues raised by Easley. Recusal is required even if a judge lacks actual knowledge of facts indicating his bias or interest in the case only if a reasonable person knowing all of the facts would expect that the judge would have actual knowledge. *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847 (1988). The fact that Judge Feikens and his sons graduated from the University of Michigan Law School, that the Judge participates in a club and a committee for basically social purposes, that the Judge raised money for the Law School Fund over 20 years ago, and that the Judge contributes money to his alma mater would not cause a reasonable person knowing *all* the facts to expect Judge Feikens to have actual knowledge of the Easley matter. The Sixth Circuit correctly held, therefore, that Judge Feikens did not abuse his discretion in denying Easley's motion.

CONCLUSION

For the reasons stated above, Respondents respectfully request this Court to deny the Petition for a Writ of Certiorari.

Respectfully submitted,

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